PUBLIC PROSECUTOR v. LEE CHIN CHAI & 6 ORS.

[A.Cr.J. (Arulanandom J.) March 25, 1974]
[Kuala Trengganu — Criminal Appeal No. 24 of 1973]

Fisheries Act, 1963 — Boat seized after enquiry — Whether equipment to be seized and forfeited — Detention and forfeiture of vessel.

This case proceeded from an enquiry held by the magistrate pursuant to the Fisheries Act in regard to the seizure of a vessel detained in Malaysian waters within which were found quantities of fish which had been captured with the aid of explosives contrary to section 12(2) of the Fisheries Act. In the boat were also found fishing appliances for which a licence from the Director of Fisheries had not been obtained. The taikong and crew were charged with offences under regulation 3(b) of the Fisheries (Maritime) (Amendment) Regulations, 1967 and an offence under section 12(2) of the Fisheries Act, 1963.

The magistrate came to the conclusion that the owner of the vessel was completely innocent and made an order returning the vessel to the owner. The Public Prosecutor appealed.

Held: an offence under regulation 3(b) of the Fisheries (Maritime) Regulation 1967 can only apply to the appliances and not in respect of the vessel in which they were found. While fishing appliances without a licence on board a vessel were the subject matter of the offence the vessel itself was not. The vessel was therefore not subject to seizure and forfeiture.

CRIMINAL APPEAL.

Yaacob bin Hj. Ismail (Deputy Public Prosecutor) for the appellant.

A. Wilson for the respondent.

Arulanandom J.: This is an appeal by the Public Prosecutor against the decision of the learned magistrate in Kuala Trengganu given at an enquiry held at the Magistrate's Court on the 7th day of July, 1973, whereby he released to the owner a boat seized under the Fisheries Act, 1963 (No. 8 of 1963). The appeal was also against the order that the boat was to be released and returned to the owner on his entering into a bond to produce the same in the sum of $6,000 in one surety if an appeal was lodged. As the second order was consequential of the first I do not propose to deal with it.

The facts of the case are simply as follows. A Singapore fishing boat was detained in Malaysian waters and in the boat were found quantities of fish which had been captured with the aid of explosives contrary to section 12(2) of the Fisheries Act. In that boat were also found fishing appliances for which a licence from the Director of Fisheries had not been obtained. The fishing vessel was boat No. SMF 465. The taikong and the crew were charged with the offence of being in possession of fishing appliances without a licence from the Director of Fisheries under regulation 3(b) of the Fisheries (Maritime) (Amendment) Regulations, 1967 (P.U. 387) and for an offence under section 12(1) of the Fisheries Act, 1963. As regards this second charge it has been said that there has been an irregularity in the framing of the charge and that it should read as section 12(2) of the Fisheries Act and not section 12(1). I agree that there has been an irregularity in the framing of the charge.

All the accused pleaded guilty to both charges. Subsequently the magistrate held an enquiry and I must state that the enquiry proceeded wholly on immaterial and irrelevant grounds for the magistrate was seeking to establish whether the owner knew, or connived, or permitted the use of the vessel in contravention of the laws which I have referred to. The magistrate came to the conclusion that the owner was completely innocent and made an order returning the vessel to the owner. But against his order the learned Public Prosecutor has appealed on the ground that the magistrate, firstly, had no jurisdiction to hold an enquiry and, secondly, that forfeiture in these cases is mandatory and, therefore, the order made by the magistrate releasing the vessel is illegal. There is not any serious controversy that forfeiture is mandatory but I am not prepared to hold that the magistrate had no jurisdiction to hold the enquiry because an enquiry would have been proper to satisfy himself that the provisions of section 14 and section 15 of the Fisheries Act were complied with. The learned counsel for the respondent, however, raised one point which I felt deserved consideration. That point was never raised in the court below but as it involves penal provisions of the law I am entitled to consider it. He argued that section 15(1)(b) of the Fisheries Act referring to subjects which can be forfeited, says that: —

"(b) that the thing was the subject matter of or was used in the commission of the offence notwithstanding that no person may have been convicted of such offence."

He referred to regulation 3(b) of the Fisheries (Maritime) Regulations, 1967 (P.U. 49), as amended by P.U. 387 of 1967, which reads: —

"No person shall —

(b) have in his possession on board a vessel any fishing appliances or any part thereof;"

Fishing appliances are defined in regulation 2 of the same Regulations and, needless to say, a vessel is not included in it. He argued that the subject matter of the charge was fishing appliances and not the vessel itself.

Looking at section 14 of the Fisheries Act, it reads: —

"14.(1) All vessels, vehicles, nets, instruments, fishing materials, appliances, fish or fishing stakes in respect of which any Fishery Officer or any police officer not below the rank of corporal has reason to believe that an offence has been committed contrary to the provisions of this Act or any regulations or rules made thereunder may be seized by such officer without warrant."

Under section 2 of the Fisheries Act the Minister may make regulations relating to maritime and estuarine fishing and fisheries and among other things make regulations under section 2(b) "to regulate or prohibit any method of fishing or the possession in a vessel of traps or fishing nets or the use of traps or fishing nets in maritime and estuarine waters". Regulation 3(b) of the Fisheries (Maritime) Regulations, 1967 is made under the foregoing power.

It may be pertinent at this stage to compare the provisions for seizure and forfeiture contained in other Ordinances. I will first refer to section 114 of the Customs Ordinance, 1962 (No. 42 of 1962). Now section 114(1) of the Customs Ordinance reads as follows: —

"114.(1) All goods in respect of which there has been, or there is, reasonable cause to suspect that there has been committed any offence against this Act or any regulation made thereunder, or any breach of any of the provisions of

this Act or of any regulation made thereunder or of any restriction or condition subject to or upon which any licence or permit has been granted, *together with any receptacle, package, conveyance, vessel* not exceeding two hundred tons nett registered tonnage, or aircraft other than an aircraft engaged in international carriage, in which the same may have been found or which has been used in connection with such offence or breach, and any books or documents which may reasonably be believed to have a bearing on the case, may be seized by any officer of customs in any place either on land or in territorial waters."

The operative words are in the middle of that section (italicized by me) which gives powers to seize goods "together with any receptacle, package, conveyance, vessel not exceeding two hundred tons nett". Section 126 goes on to say that "All goods liable to seizure under the provisions of this Act, shall be liable to forfeiture." And section 127 gives powers to the court to forfeit these goods or vessels or vehicles which were seized and here, too, in section 127(1), forfeiture is mandatory once the goods are seized in a proper manner and the goods are the subject matter as provided in section 114(1).

In the Road Traffic Ordinance, 1958 (No. 49 of 1958) section 92(2) which provides for seizure and forfeiture, says: —

"Any motor vehicle in respect of which there has been, or there is reasonable cause to suspect that there has been committed any offence against this section may be seized by any road transport officer or any police officer not below the rank of Inspector in any place."

and sub-section (4) reads: —

"An order for the forfeiture or for the release of any motor vehicle seized under the provisions of sub-section (2) shall be made by the court before which the prosecution with regard thereto has been held, and an order for the forfeiture of such vehicle may be made if it is proved to the satisfaction of the court that an offence against this section has been committed and that the vehicle was the subject matter of the offence, notwithstanding that no person may have been convicted of such an offence."

It will be noted that under the Road Traffic Ordinance the vehicle itself is the subject matter of the offence, or, in other words, "in respect of which an offence has been committed", and hence is liable to seizure and forfeiture, although forfeiture is not mandatory but discretionary.

So, when one compares the three Ordinances there is provision for forfeiture in all of them, but the Road Traffic Ordinance provides for forfeiture of a vehicle which has been a subject matter of the offence. The Customs Ordinance permits the seizure of a vessel used in conveyance of goods which are suspected of an offence against the Customs Ordinance. Now it has long been established that forfeiture imposes a severe and harsh penalty on subjects, albeit sometimes on innocent subjects, and therefore the provisions must be construed strictly. In comparing the different terminology in different laws I must presume that these differences are intentional.

Having given considerable thought to these distinctions in the other Ordinances and having listened to the arguments before me and especially having considered the wording of regulation 3(b) of the Fishing (Maritime) Regulations, 1967, I am forced to the conclusion that while fishing appliances without a licence on board a vessel are the subject matter of an offence under that section, the vessel itself is not, nor can it be said to be used in the commission of the offence under regulation 3(b). On the other hand, if the charge was under section 12(1) of the Act, it may be said that the vessel was used in the commission of the offence, while a charge under section 12(2) may not.

There are several Acts and Ordinances which make it an offence to be in possession of certain articles in certain places while the possession of the same articles in other places does not constitute an offence. It is clear from the interpretation of these Acts that the subject matter of the offence is the article itself and not the place where it is found and, therefore, in considering section 15 which provides for the forfeiture one must read it with section 14 which provides for seizure. Things liable to seizure are liable to forfeiture. But section 14 only applies to the things in respect of which an offence has been committed. An offence under regulation 3(b) of the Fisheries (Maritime) Regulations, 1967, cannot mean that an offence has been committed in respect of the vessel in which they were found; it can only apply to the appliances. If my interpretation is correct, then the vessel is not subject to seizure and forfeiture.

For the reasons I have set out earlier I will dismiss the appeal and release the said vessel.

Appeal dismissed.

Solicitors: *Wilson & Co.*

KHAN KAM CHEE v. LOKE WAN YAT REALTY SDN. BHD.

[O.C.J. (Mohamed Azmi J.) March 28, 1974]
[Kuala Lumpur — Civil Suit No. 782 of 1973]

Practice and Procedure — Pleadings — Counterclaim — Amendment of statement of defence — Addition of co-defendant to propose counterclaim — R.S.C., 1957, O.21, r.11.

The plaintiff sued the defendant by specially indorsed writ for specific performance of an alleged agreement whereby the defendant had given the plaintiff an option to purchase a certain piece of land. Subsequently the defendant applied to amend the defence and to include a counterclaim therein and to add a third party Toby Lam as co-defendant to the counterclaim.

Held: (1) in this case there was no reasonable cause of action against the plaintiff on the counterclaim and the question of adding Toby Lam as a co-defendant to the counterclaim could not possibly arise;

(2) as the amendments to the statement of defence did not entail injustice to the other side, they should be allowed.

Cases referred to:-

(1) *Times Cold Storage Co.* v. *Lowther* [1911] 2 K.B. 100.

(2) *Tham Hoeng Meow* v. *Allied Timber Co. Ltd.* K.L. C.S. No. 189/71 (unreported).

(3) *Derry* v. *Peek* (1889) 14 App. Cas. 337.

Authorities cited other than those referred to in the judgment: *Federal Flour Mills Ltd.* v. *Owners of the Vessel "Ta Tung" & Anor.* [1970] 2 M.L.J. 147; *Factories Insurance Co. (Ltd.)* v. *Anglo-Scottish General Commercial Insurance Co. (Ltd.)* [1913] 29 T.L.R. 312 C.A.; *Quinn* v. *Leathem* [1901] A.C. 495; *Marrinan* v. *Vibart & Anor.* [1963] 1 Q.B. 528; *Torquay Hotel Co. Ltd.* v. *Cousins & Ors.* [1969] 1 A.E.R. 522; *Cartwith Ltd.* v. *J.E. Lloyd & Ors.* [1965] M.L.J. 140.